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# The Rights of a Reversionary Lessee Excluded from Possession by a Holdover Tenant: The Pennsylvania Position

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# THE RIGHTS OF A REVERSIONARY LESSEE EXCLUDED FROM POSSESSION BY A HOLDOVER TENANT: THE PENNSYLVANIA POSITION

## INTRODUCTION

Ordinarily, a tenant encounters few difficulties in gaining possession of the leased premises at the beginning of his term. When, however, a new lessee is excluded from possession by a prior tenant holding over without right, important questions arise as to the remedies of the new lessee. This Comment will deal with the rights and remedies of such a reversionary lessee,[1] under Pennsylvania law, against both the lessor and the holdover tenant where the lessee is prevented from entering the demised premises by the wrongful acts of the holdover tenant.[2] As will be developed in this Comment, the law of Pennsylvania provides little satisfaction to a lessee in such a situation.

An important distinction exists between a lease in reversion and an agreement to lease. An agreement to lease is an executory contract, whereas a lease in reversion is an executed contract and a conveyance.[3] An agreement to lease vests no estate in the proposed lessee,[4] while a lease in reversion vests in the lessee an interest in the term which may be perfected into rightful possesion by entry when that term has begun.[5] The holder of such an interest, which is often referred to as an *interesse termini,* is protected against acts of the lessor which prevent him from taking possession,[6] however, it is doubtful that the holder of an *interesse termini* is protected against acts of third parties.[7]

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1. A reversionary lessee is one who holds under a lease which becomes effective at the expiration of a prior lease. Such a lease may arise by making the time for the beginning of one lease correspond with the time for the termination of the previous lease or by wording the second lease with reference to the prior lease so as to become effective upon its termination. 49 AM. JUR. 2d *Landlord & Tenant* § 100 (1970).

2. This Comment will deal with the rights of a "landlord" against a holdover tenant only so far as they relate to rights of a lessee. Neither the lessee's nor the landlord's measure of damages will be discussed.

3. STERN'S TRICKETT ON THE LAW OF LANDLORD AND TENANT § 8 (3d ed. 1950).

4. Henderson v. Clay Mfg. Co., 24 Pa. Super. 422, 425 (1905).

5. Williams v. Downing, 18 Pa. 60, 63 (1851).

6. McClurg v. Price, 59 Pa. 420 (1868).

7. *See* Section I and accompanying notes *infra.*

The common law rule that entry by the lessee was required to consummate an estate for years has been modified in Pennsylvania by the recording statutes.[8] The recording of a lease for a term exceeding twenty-one years or for a shorter term when the lease is unaccompanied by possession is considered the equivalent of physical entry, by virtue of the statute, for the purposes of consummating the relationship of landlord and tenant.[9] Thus, where the lessee has recorded his lease, he ceases to be the mere holder of an *interesse termini* and becomes the holder of an estate for years, entitled to possession when the term begins.[10]

It is suggested that all leases in reversion be recorded, since by definition, possession does not accompany such a lease. The act of recording would obviate many of the problems of a lessee who has not entered the demised premises, but who wishes to take action against a holdover tenant. In practice, however, few leases for use and occupancy for a term of less than twenty-one years are recorded. In recognition of this fact, this Comment will only deal with unrecorded leases for a term.

## I. Lessee's Rights Against the Holdover Tenant

A number of remedies are available to regain possession of real property: ejectment, summary proceeding, forcible detainer, injunction, and self-help. This section will examine the availability of these conventional remedies as applied to a reversionary lessee and also those compensatory remedies to which such a lessee might have access in an action against a holdover tenant.

### *A. Ejectment*

At common law, no lease for years was looked upon as complete until there was an actual entry by the lessee.[11] It has long been settled in Pennsylvania that the right to possession as against a third party is in the lessor until the lessee enters.[12] Upon such entry, the right of possession is transferred from the lessor to the lessee, enabling the latter to maintain an action in ejectment.[13] Before entry, the lessee holds only an *interesse termini*, an interest

8. Pa. Stat. Ann. tit. 21, § 471 (1955); Pa. Stat. Ann. tit. 16, § 9751 (1956).
9. St. Vincents Roman Catholic Cong. v. Kingston Coal Co., 221 Pa. 349, 363, 70 A. 838, 844 (1908).
10. *Id.*
11. Sennett v. Bucher, 3 Pen. & W. 392, 393 (Pa. 1832).
12. *Id.* at 394.
13. *Id.*

which does not empower a lessee to bring an ejectment action against a third party.[14]

Stern, in his treatise on Pennsylvania landlord and tenant law, states that when a lessee's term begins, he may obtain possession of the demised premises by an action of ejectment against any party in possession.[15] This statement is inaccurate, however, in that it fails to distinguish between leases for occupancy and use and leases for the removal of minerals.[16] The rule in Pennsylvania where real property is demised for the purpose of occupancy and use, is that the lessee must have been in possession of the premises before he can maintain ejectment.[17] In *Taylor v. Kaufhold*,[18] the Supreme Court of Pennsylvania, speaking of the availability of ejectment stated that "[t]he law is not clear as to whether ejectment would lie by a tenant who had never been in possession."[19] It would appear, however, that the confusion is again in reference to the different standards applied to leases for use and occupancy and leases of minerals and mineral rights. The case law is clear that in Pennsylvania a lessee holding under a lease for use and occupancy must have been in possession of the premises before he can maintain an action in ejectment.[20] Mineral leases are treated differently because they are not merely leases for use and occupancy, but carry with them the title to the minerals and the right to remove them.[21] In such leases, actual entry is not a prerequisite for ejectment.[22]

### B. *Summary Proceeding for the Recovery of Possession of Real Property*

Actions before justices of the peace for the recovery of possession of real property in Pennsylvania are governed by the Rules of Civil Procedure for Justices of the Peace.[23] The right to sum-

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14. Williams v. Downing, 18 Pa. 60, 63 (1851).

15. STERN'S TRICKETT ON THE LAW OF LANDLORD AND TENANT § 298 (3d ed. 1950).

16. Dime Bank & Trust Co. v. Walsh, 143 Pa. Super. 189, 17 A.2d 728 (1941). The court stated that leases of oil, gas, and other minerals do not require entry to be consummated as they "are not merely leases for use and occupancy, but carry with them the title to the minerals and the right to remove them." *Id.* at 196, 17 A.2d at 731.

17. *Id.*

18. 368 Pa. 538, 84 A.2d 347 (1951).

19. *Id.* at 543-44, 84 A.2d at 350. The court cited as authority for this proposition: Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207 (1909); Sennett v. Bucher, 3 Pen. & W. 392 (Pa. 1832); Dime Bank & Trust Co. v. Walsh, 143 Pa. Super. 189, 17 A.2d 728 (1941). These cases held that ejectment would not lie where a lessee, holding under a lease for use and occupancy, had not entered the premises.

20. Cases cited note 19 *supra*.

21. *See* note 16 *supra*.

22. *See, e.g.*, Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207 (1909).

23. PA. R. CIV. P.J.P. (Justices of the Peace), as amended June 1, 1971.

mary procedure is granted only to those having the status of "landlord."[24] There is no indication in the rules as to what persons have the status of "landlord,"[25] nor have any case interpretations been found. It is evident that the right to bring this action has not been extended beyond the interpretations under the earlier acts and case law.

Prior to the adoption of the Rules of Civil Procedure for Justices of the Peace, summary proceedings for the recovery of possession of real property were governed by article V of the Landlord and Tenant Act of 1951.[26] To begin suit under this Act for recovery of possession, the plaintiff must have had the status of "landlord."[27] Those who were considered "landlords," other than the original lessor, were enumerated in two sections of the Act.[28] An examination of these sections clearly indicates that a lessee was not given the status of "landlord" and thus had no standing to maintain such a summary proceeding.

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24. PA. R. CIV. P.J.P. (Justices of the Peace), 501:
As used in this chapter "action" means an action by a landlord against a tenant for the recovery of real property brought before a justice of the peace.
PA. R. CIV. P.J.P. (Justices of the Peace) 503:
c. The complaint shall set forth:
. . .
(3) that the plaintiff is the landlord of that property.
(4) that he leased or rented the property to the defendant or to some other person under whom the defendant claims.

25. However, PA. R. CIV. P.J.P. 503(c)(4) seems to indicate that "landlord" is to include only the original lessor.

26. PA. STAT. ANN. tit. 68, §§ 250.501-250.511 (§§ 250.502-250.510 suspended absolutely 1970 by PA. R. CIV. P.J.P. 581).

27. STERN'S TRICKETT ON THE LAW OF LANDLORD AND TENANT § 487 (Supp. 1968).

28. PA. STAT. ANN. tit. 68, § 250.104 (1965):
Any person who acquires title to real property by descent or purchase shall be liable to the same duties and shall have the same rights, powers, and remedies in relation to the property as the person from whom title was acquired.
PA. STAT. ANN. tit. 68, § 250.303 (1965):
(a) the following persons shall have the right to collect all rent due by assumpsit or distraint on personal property located on the real property subject to such rent:
(1) The owner of a ground rent;
(2) The personal representative of a deceased landlord or deceased tenant for life who has demised the real property subject to his estate, or a deceased landlord whose real property has escheated to the Commonwealth, whether such rent accrued prior to or after the death of the decedent and until the termination of the administration of the estate;
(3) The escheator appointed for the purpose of collecting rents;
(4) The spouse of a deceased landlord to whom real property has been put aside as his or her allowance by law; and

"Landlord" status for the purposes of a summary proceeding for the recovery of possession of real property has also been defined under the case law interpreting the earlier acts. Under the Act of 1772, access to summary proceedings was furnished to "any person or persons in this province" having demised lands, or "his or her heirs or assigns."[29] The main intent of the Act was to restore speedy possession to "landlords" who were entitled to it without putting them to the delay and expense of an ejectment.[30] Since action under the Act of 1772 was available only to lessors, their heirs, or assigns,[31] a lessee would have to come under one of these categories in order to come within the purview of the Act. It must be recognized, however, that acts which confer summary jurisdiction on justices of the peace are to be strictly construed, since such proceedings were unknown at common law.[32] A lessee was not provided for by this Act, since he was neither a lessor, an heir, or an assign.[33] In addition, there was no evidence of a legislative intent to provide a remedy to one who could not maintain ejectment, where the purpose of the Act was to provide relief from the hardships of an ejectment.[34] No cases were found which precluded a lessee from access to the Act's procedure. However, in a case where a life tenant had demised the premises and died during the term, it was held that the remainderman could not proceed under the Act of 1772 because she was not the lessor, nor was she the heir or assignee of the lessor, "the only persons to whom the right accrues under the Act."[35] This reasoning would apply equally to a lessee and prevent access to the procedure provided by the Act of 1772.

The Act of 1863[36] was enacted in addition to, and not as a substitute for, the Act of 1772.[37] This Act was furnished to "land-

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(5) A widow who is the party named in a deed, agreement or decree of court under which a charge is made upon such real estate for the payment of installments of dower.

(b) Any person given the right by this section to collect and distrain for rent shall be deemed for the purposes of this act to be a *landlord.* (emphasis added)

29. Act of March 21, 1772, 1 Smith L. § 12 [1772] (Repealed 1951).

30. Logan v. Herron, 8 S. & R. 459, 461 (Pa. 1822).

31. The word "assign" is synonomous with "assignee."

32. McMillan v. McCreary, 54 Pa. 230 (1867). *But see*, Gardner v. Keteltas, 3 Hill 330 (N.Y. 1842), holding that such acts being remedial in nature should be liberally construed.

33. An assignment differs from a lease in that a lessor transfers an interest less than his own and reserves an interest or estate after the end of the term, while an assignment transfers the whole estate and no rent nor interest in the property is reserved. Williams v. Randolph & C. Ry., 182 N.C. 267, 272, 108 S.E. 915, 918 (1921).

34. *See* Logan v. Herron, 8 S. & R. 459 (Pa. 1822).

35. May v. Kendall, 8 Phila. 244, 246 (Pa. C.P. 1871).

36. Act of December 14, 1863, No. 963, § 1, [1864] Pa. Laws 1125 (repealed 1951).

37. The principle differences between the Act of 1863 and the Act of 1772 were that the Act of 1963 did not require twelve jurors and provided for certiorari. The Act of 1863 applied only to leases of one year or more

lords"[38] and was later supplemented by the Act of 1867[39] to cover cases in which the owner of the demised premises had acquired title by descent or purchase from the original lessor.[40] The right to proceed under this Act was based on the existence of a landlord-tenant relationship between the parties.[41] A lessee under a lease in reversion does not stand in a landlord-tenant relationship with the tenant in possession even though that tenant has held over into the time the lease in reversion was to have commenced.[42]

From the above analysis of the pertinent acts and rules, their purposes and the case law interpreting them, it is evident that the summary proceeding for the recovery of possession of real property in Pennsylvania is not available to a lessee, especially since the right to possession of the premises is in the lessor as against third parties until entry by the lessee.[43]

### C. *Forcible Detainer*

The primary purpose of the Pennsylvania forcible detainer statute[44] is to prevent breaches of the peace. Its purpose is not to provide an alternative civil remedy despite the restitution clause.[45] By the terms of the statute, a charge of forcible detainer

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but was supplemented to include leases for less than one year by the Act of March 31, 1905. No. 62, §§ 1-3 [1905] Pa. Laws 87 (repealed 1951).

38. "Any person . . . , having demised or leased lands . . . it shall be lawful for such lessor, his agent or attorney to complain." Act of December 14, 1863, No. 963, § 1, [1864] Pa. Laws 1125 (repealed 1951).

39. Act of February 20, 1867, No. 10, § 1, [1867] Pa. Laws 30 (repealed 1951).

40. This supplemental Act was not really necessary since the statute of 32 Hen. 8, c. 34 was in effect in Pennsylvania, stating that grantees or assignees of the reversion, or assignees of lessors shall enjoy the same benefits which lessors or grantees had or enjoyed. Shappel v. Himelstein, 121 Pa. Super. 418, 421, 183 A. 644, 646 (1936).

41. Koontz v. Hamond, 62 Pa. 177, 182 (1869); Woodward v. Woodward, 57 Pa. D. & C. 423, 427 (C.P. Wash. 1946).

42. 49 AM. JUR. 2d *Landlord & Tenant* § 100 (1970); Kokomo Rubber Co. v. Anderson, 33 Ga. App. 241, 125 S.E. 76 (1926).

43. *See* note 12 and accompanying text *supra*.

44. PA. STAT. ANN. tit. 18, § 4404 (1963):

> Whoever, by force and with a strong hand, or by menaces and threats, unlawfully holds and keeps possession of any lands or tenements, whether the possession was obtained peaceably, or otherwise is guilty of forcible detainer, a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment not exceeding one (1) year, or both, and make restitution of the lands and tenements unlawfully detained.
>
> No person shall be adjudged guilty of forcible detainer, if such person, by himself, or by those under whom he claims, have been in peaceable possession for three (3) years next preceding such alleged forcible detainer.

45. Commonwealth v. Leibowitz, 103 Pa. Super. 479, 482, 157 A. 219, 220 (1931). *See* note 44 *supra*.

must allege an unlawful detention of the premises "by force and with a strong hand" or "menaces and threats" calculated to alarm or frighten.[46] The allegation of a common trespass is insufficient to warrant a conviction for unlawful detainer.[47]

A lessee who is excluded from possession by a holdover tenant may not charge the holdover tenant with forcible detainer for the purpose of invoking the restitution clause. In order to come within the scope of the Act, the prosecutor must aver a prior possession of the premises.[48] The possession of the prosecutor cannot be assumed, it must be proved.[49] In the trial of an indictment for forcible detainer, the title to the premises is not involved; it is the possession of the prosecutor which the law protects against acts of violence.[50]

*D. Injunction*

As a general rule, the equitable remedy of injunctive relief cannot be used merely to gain possession.[51] The reason for this limitation is the presumption that a plaintiff seeking possession of real property has an adequate remedy at law, namely, either ejectment or an equivalent statutory remedy. However, this is not an immutable rule. In *Sun Oil Company v. Merlino*,[52] the Common Pleas Court of Westmoreland County held that equitable relief might be proper to specifically enforce a lease where ejectment might not be available because the lessee had never been in possession[53] and where there was no adequate means of determining the plaintiff's potential loss.[54] In the situation where a lessee, holding under a lease in reversion, has never entered the premises, there is no remedy at law in Pennsylvania for the recovery of possession from a wrongful holdover.[55] Furthermore, actions for damages are either improper or are suspended until possession is gained.[56] In cases where the ordinary remedies at law are inadequate, the extraordinary remedy of injunction may be available to the lessee to obtain possession of the demised premises.[57] How-

46. Commonwealth v. Brown, 138 Pa. 447, 452, 21 A. 17 (1891). *See* note 44 *supra*.
47. *Id.*
48. *Id. But see* Commonwealth v. Wisner, 8 Phila. 612 (Pa. C.P. 1871), holding that a lessee having the right to possession could maintain the prosecution. Note however that this position is not representative of the current status of the law.
49. Commonwealth v. Randall, 63 Pa. Super. 238, 243 (1916).
50. Commonwealth v. Tillia, 73 Pa. Super. 548 (1920).
51. Bussier v. Weekey, 4 Pa. Super. 69, 72 (1897).
52. 3 Pa. D. & C.2d 94 (C.P. West. 1954).
53. The plaintiff might well have been able to bring ejectment in this case since the action was against the lessor rather than a third party.
54. Sun Oil Co. v. Merlino, 3 Pa. D. & C.2d 94 (C.P. Westm. 1954).
55. *See* notes 10-50 and accompanying text *supra*.
56. *See* notes 63-81 and accompanying text *infra*.
57. Vance v. Henderson, 141 Neb. 758, 4 N.W.2d 833 (1942).

ever, Pennsylvania, unlike several other states, has not decided this question.

*E. Self-help*

When a tenant has no right to continue in possession, the *landlord* may expel him from the premises without process, by using no more force than is reasonably necessary.[58] The landlord will not be liable in trespass for any consequent damages other than those resulting from unreasonable force, since the tenant is bound to remove himself from the premises, at the request of the landlord, upon termination of the lease.[59] A distinction was made in *Commonwealth v. Everhart*,[60] however, between the civil rights of a person forcibly turned out and the penal sanctions by which such a person is protected from being forcibly dispossessed.[61] Although a dispossessed party who has no right to possession of the premises may not bring an action in trespass against the landlord, the law will criminally punish the landlord for the forcible entry in order to preserve the peace.[62]

It is questionable whether a lessee has a right to self-help, since the holdover tenant's implied covenant to deliver possession at the end of his term inures to the lessor rather than the new lessee, and in light of the established rule placing the right to possession in the lessor as against third parties until entry by the lessee.[63] However, even if the lessee *is* entitled to self-help, which is doubtful, it is a dubious right, which could be effectuated with impunity only by a peaceable entry.

*F. Trespass*

In order to maintain an action in trespass, the plaintiff must have been in possession of the premises at the time of the trespass.[64] A "landlord" may, at his option, treat a holdover tenant as a tres-

58. Overdeer v. Lewis, 1 W. & S. 90, 91 (Pa. 1841).
59. *Id.*
60. 57 Pa. Super. 192 (1914). In this case, an employee occupied one of the defendant's dwellings as an incident of his employment. Upon termination of his employment, the prosecutor refused to vacate the dwelling and the defendant entered through a window and ejected the prosecutor, his family and his goods. The employer was convicted of forcible entry even though he used no more force than was necessary and offered no violence or threats to the prosecutor or his family.
61. Commonwealth v. Everhart, 57 Pa. Super. 192, 200 (1914).
62. *Id.*
63. *See* note 12 and accompanying text *supra.*
64. Sennett v. Bucher, 3 Pen. & W. 392, 394 (Pa. 1832).

passer.[65] Although a landlord is not in actual possession of the premises when he elects to treat the holding over as a trespass, the rightful possession which the holdover tenant had is considered the possession of the landlord[66] and thus an action in trespass is proper.

A lessee who has never entered into possession of the premises, however, cannot bring an action in trespass because this action which complains of a violation of one's possession could not be proper for one who has neither actual nor constructive possession.[67] Not having entered the premises, a lessee cannot create even a constructive possession in the face of an actual possession by the wrongful holdover tenant.[68]

*G. Trespass for Mesne Profits*

Trespass for mesne profits is an action for the recovery of the profits which have been accruing or arising out of the land between the time when a person's right to possession vested and the time of his recovery of possession.[69] The right to recover mesne profits for the use and profits of the land, however, is suspended until possession is gained by entry or under legal judgment.[70]

In *Taylor v. Kaufhold*,[71] the plaintiff-lessee, having gained possession as a result of an action of ejectment brought by the landlord against the holdover tenant, sued in assumpsit and proved the damages which were the natural and proximate result of the defendant's wrongful nine month trespass. The plaintiff was allowed to recover the lost profits he would have received if the defendant had delivered possession at the end of his term, and was not limited to the rental value of the premises. Although the plaintiff sued in assumpsit, the Supreme Court of Pennsylvania noted that the distinctions between trespass and assumpsit have been abolished, to a large extent, in the interests of justice.[72] The court noted that the form of action should not prevent recovery and considered the proper amendment to have been made.[73] It can thus be inferred that the proper action was trespass on the case, and that the plaintiff's recovery was in trespass. The remedy of trespass for mesne profits is available to a lessee, but, since it is suspended until possession of the demised premises is gained, it is often an ineffective remedy for a reversionary lessee who has not

65. Williams v. Ladew, 171 Pa. 369, 33 A. 344 (1895); Routman v. Bohm, 194 Pa. Super. 413, 169 A.2d 612 (1961).
66. Strong v. Nesbitt, 267 Pa. 294, 299, 110 A. 250, 251 (1920).
67. Sennett v. Bucher, 3 Pen. & W. 392, 394 (Pa. 1832).
68. Kossell v. Rhoades, 272 Pa. 75, 77, 116 A. 56 (1922).
69. BLACK'S LAW DICTIONARY 1376 (Rev. 4th ed. 1968). *See, e.g.*, Roukous v. DeGraft, 40 R.I. 57, 99 A. 821 (1917).
70. Smith v. Smith, 77 Pa. Super. 227, 234 (1921).
71. 368 Pa. 538, 84 A.2d 347 (1951).
72. *Id.* at 544, 84 A.2d at 351.
73. *Id.*

previously entered the premises and has no remedy to obtain possession of the demised premises.

*H. Assumpsit*

Ordinarily when one occupies the land of another, an obligation arises to pay for such occupancy.[74] The proper action upon breach of that obligation would be assumpsit for use and occupancy.[75] This action is founded on contract, express or implied, and lies only when the relationship of landlord and tenant exists.[76] The relationship of landlord and tenant, however, does not arise between two consecutive lessees, even when the first lessee holds over into the term of the second lessee.[77] The holdover tenant's status with respect to the subsequent lessee is at most that of trespasser, and it is quite clear that assumpsit will not lie against one who occupies land as a mere trespasser.[78] Furthermore, if the lessee has no interest in the property, as in the case of a lessee who has not entered the premises,[79] assumpsit may not be maintained.[80] In resolving this issue in *Taylor v. Kaufhold*,[81] the Supreme Court of Pennsylvania inferred that assumpsit was technically not the proper action for a lessee to bring to recover damages from a holdover tenant.[82]

## II. Rights Against the Lessor

There has been an historical diversity among American jurisdictions as to a landlord's duty to deliver possession of the demised premises to his lessee.[83] There is considerable precedent supporting the two varying positions, known as the American Rule[84] and

74. *In re* Cuyler's Estate, 86 Pa. Super. 502, 504 (1925).
75. *Id.*
76. McCloskey v. Miller, 72 Pa. 151, 154 (1873).
77. Am. Jur. 2d *Landlord & Tenant* § 100 (1970).
78. McCloskey v. Miller, 72 Pa. 151, 154 (1873).
79. *See* note 12 and accompanying text *supra.*
80. Philadelphia v. Pa. Sugar Co., 348 Pa. 599, 603, 36 A.2d 653, 655 (1944).
81. 368 Pa. 538, 84 A.2d 347 (1951).
82. *See* notes 71-73 and accompanying text *supra.*
83. *See* Annot. 70 A.L.R. 151 (1931).
84. California: Lost Key Mines v. Hamilton, 109 Cal. App. 2d 569, 241 P.2d 273 (1952); Playter v. Cunningham, 21 Cal. 229 (1862); Hawaii: Judd v. Ladd, 1 Haw. 75 (1845); Illinois: Gazzolo v. Chambers, 73 Ill. 75 (1874); Maryland: Rice v. Biltmore Apts. Co., 141 Md. 507, 119 A. 364 (1922); Massachusetts: Snider v. Deban, 249 Mass. 59 (1923); Mississippi: West v. Kitchell, 109 Miss. 328 (1915); New Hampshire: Prendergast v. Young, 21 N.H. 234 (1850); New York: Gardner v. Keteltas, 3 Hill 330 (1842); Vermont: Underwood v. Birchard, 47 Vt. 305 (1875); Virginia: Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930). The American Rule is sometimes referred to as the New York Rule.

the English Rule.[85] However, the present weight of authority seems to favor the English Rule. The essence of the English Rule, as first stated in *Coe v. Clay*,[86] is that the lessor impliedly covenants that the premises shall be open to entry by the tenant on the first day of the term; this covenant is breached if possession is withheld from the lessee either wrongfully or by right.[87]

The American Rule merely views the implied covenant to deliver possession as a corollary to the covenant of quiet enjoyment, holding that possession must not be withheld from the lessee by the lessor himself, one holding under the lessor by right, or one holding under paramount title. The leading case espousing this rule is *Gardner v. Keteltas*,[88] wherein the Court of Appeals of New York required the lessor to deliver only the *legal right* to possession to his lessee.

It is important to note at this point that neither rule is germane if the parties have expressly stated their covenants in their lease. Both rules are in accord that the covenant to deliver possession is breached when the lessee is excluded by acts of the lessor, or when the lessor cannot deliver a valid legal right to possession. When, however, a lessee is excluded from possession by a third party who wrongfully occupies the premises, the allocation of risk between the lessor and the lessee depends upon the legal presumption attached to the intentions of the parties. The English Rule and the American Rule represent the two presumptions which govern in this circumstance.

The rationale for the English Rule is summarized by the often quoted phrase "he who lets, agrees to give possession and not merely a chance of a law suit."[89] In *King v. Reynolds*,[90] a leading English Rule case, the Alabama Supreme Court stated that "the prime motive for the contract [to lease] is, that the lessee shall have possession; as much so as if a chattel were the subject of the

85. Alabama: King v. Reynolds, 67 Ala. 229 (1880); Arkansas: Rose v. Wynn, 42 Ark. 257 (1883); Arizona: Cheshire v. Thurston, 70 Ariz. 299, 219 P.2d 1043 (1950); Connecticut: Cohn v. Norton, 57 Conn. 480 (1889); Indiana; Spencer v. Burton, 5 Blackf. 57 (1838); Kansas: Stewart v. Murphy, 95 Kan. 421, 148 P. 609 (1915); Kentucky: Mattingly v. Brents, 155 Ky. 570 (1913); Missouri: Rieger v. Welles, 110 Mo. App. 166 (1904); New Jersey: Adrian v. Rabinowitz, 116 N.J.L. 586, 186 A. 29 (1936); Nebraska: Herpolsheimer v. Christopher, 76 Neb. 352, 107 N.W. 382 (1906); New Mexico: Barfield v. Damon, 56 N.M. 515, 245 P.2d 1032 (1952); North Carolina: Sloan v. Hart, 150 N.C. 269, 63 S.E. 1037 (1909); Ohio: Mullins v. Brown, 87 Oh. App. 427, 94 N.E.2d 574; Oklahoma: King v. Coombs, 36 Okla. 396, 122 P. 181 (1911); Oregon: Obermeier v. Mattson, 98 Oreg. 195, 192 P. 283 (1920); Tennessee: Bloch v. Busch, 160 Tenn. 21, 22 S.W.2d 242 (1929); Texas: Hertzberg v. Beisenbach, 64 Tex. 262 (1885); Washington: Shreiner v. Stanton, 26 Wash. 563 (1902); Wisconsin: Cross v. Heckert, 120 Wis. 314 (1904).

86. 5 Bing. 440, 130 Eng. Rep. 1131 (C.P. 1829).

87. King v. Reynolds, 67 Ala. 229, 232 (1880).

88. 3 Hill 330 (N.Y. 1842).

89. Coe v. Clay, 5 Bing. 440, 130 Eng. Rep. 1131 (C.P. 1829).

90. 67 Ala. 229 (1880).

purchase."[91] In that case, the court drew an analogy between a lease and a contract to sell a chattel, the latter normally requiring a delivery of possession as a prerequisite to its consummation. This argument appears faulty in several respects. The chattel rationale is rebutted in *Hannan v. Dusch*,[92] where the Supreme Court of Virginia pointed out that a lease "is not a mere chattel which passes by delivery, but a chattel real."[93] The chattel interest in a lease is not the premises, but the lessee's title and his right to possession, which become perfect at the commencement of the term.[94] Leading commentators in the area of real property have differed as to the applicability of contract law to leases. Tiffany feels that it is erroneous and misleading to speak of leases in contract terms,[95] while Thompson states that property concepts control the contract aspects of leases.[96] Even if the chattel rationale were accepted, an additional flaw in this analogy is that physical delivery of a chattel is not an absolute requirement in all contracts.[97]

The rationale underlying the American Rule is that "[the law] will not judge that the lessor covenanted against the wrongful acts of strangers unless the covenant be full and express to the purpose."[98] In *Hannan v. Dusch*,[99] the Supreme Court of Virginia critically observed that the English Rule is a unique exception "which stands alone in implying a contract of insurance on the part of the lessor to save his tenant from the flagrant wrong of another person."[100] The court went on to say that "such an obligation is so unusual and the prevention of such a tort so impossible as to make it certain, we think, that it should always rest upon an express contract."[101] The jurisdictions adopting the American Rule have been unwilling to extend the covenant of quiet enjoyment beyond the acts of the lessor or someone holding a paramount title; nor have they been willing to view the covenant to deliver possession as a separate covenant as suggested by Thompson.[102]

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91. *Id.* at 233 (parenthetical material added).
92. 154 Va. 356, 153 S.E. 824 (1924).
93. *Id.* at 360, 153 S.E. at 827.
94. In Pennsylvania and some other jurisdictions, entry by the lessee is necessary to perfect his title. However, even in these jurisdictions, the right to possession as against the lessor is perfected at the commencement of the term.
95. 1 H. TIFFANY, REAL PROPERTY, §§ 74, 95 (3d ed. 1939).
96. 3 G. THOMPSON, REAL PROPERTY, §§ 1110, 1112 (1959).
97. 2 S. WILLISTON ON SALES, §§ 263, 405(a), 454 (Rev. ed. 1948).
98. Gardner v. Keteltas, 3 Hill 330, 332 (N.Y. 1842).
99. 154 Va. 356, 153 S.E. 824 (1930).
100. *Id.* at 363, 153 S.E. at 830.
101. *Id.*
102. 3 G. THOMPSON, REAL PROPERTY, § 1130 (1959).

The American and English rules have apparently evolved out of different circumstances and thus the two rules may not be as divergent as they appear. The rights of the lessor and lessee in a given jurisdiction may well be the key to the adoption of one rule over the other. One commentator has suggested that "logic would seem to require that the basis for a court's choice between the two available rules—the English and the American—would be inextricably connected with the proper party maintaining a summary remedy of possession."[103] Thus, where the lessor is the only party capable of maintaining the action, there should be a duty upon the landlord to deliver actual possession, but no such duty should exist where the lessee is also permitted to maintain the summary proceeding.[104] This thesis seems to have been supported by the case law of the jurisdictions which have ruled on this issue.[105] Alabama has adopted the English Rule[106] and in distinguishing *Gardner v. Keteltas*[107] and *Gazzolo v. Chambers*,[108] cases decided in jurisdictions which adhere to the American Rule, the Supreme Court of Alabama stated:

> [I]t would seem that they [New York and Illinois] have statutes authorizing a lessee to dispossess a trespasser found in possession, or tenant holding over, by summary remedy. In this state, no statute exists by which a tenant, not having had prior possession, can evict such intruder by summary proceeding. The lessor in such case could.[109]

It appears initially that Pennsylvania has adopted the American Rule. In fact, *Cozens v. Stevenson*[110] has been cited as the first case to adopt this rule.[111] The Supreme Court of Pennsylvania held in *Cozens*, that there was *no* implied warranty to deliver possession where a lease to commence *in futuro* stated that there was a third party then in possession.[112] However, the court restricted its decision to the specific facts presented, holding that no implied duty to deliver possession arose from the terms of *that* lease.[113] The court reasoned that by expressly incorporating in the lease the fact that a third party was then in possession, both parties must have contemplated that the tenant might hold over. In spite of this possibility, there was no mention in the lease of a special duty on

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103. Comment, *The Landlord's Duty to Place a Tenant into Possession—Forcible-Entry and Unlawful-Detainer Statutes*, 35 TENN. L. REV. 656, 657 (1968).
104. *Id.*
105. *Id.* at 672, n.149.
106. King v. Reynolds, 67 Ala. 229 (1880).
107. 3 Hill 330 (N.Y. 1842).
108. 73 Ill. 75 (1874).
109. King v. Reynolds, 67 Ala. 229, 232 (1880).
110. 5 S. & R. 421 (Pa. 1819).
111. Comment, *The Landlord's Duty to Place a Tenant into Possession-Forcible-Entry and Unlawful-Detainer Statutes*, 35 TENN. L. REV. 656, 657 n.8 (1968).
112. Cozens v. Stevenson, 5 S. & R. 421, 423 (1819).
113. *Id.*

the landlord to guarantee possession at the beginning of the term. The tenant in this case obtained a power of attorney from the landlord in his lease, by virtue of which he proceeded against the hold-over tenant, and recovered possession of the premises.[114] The court followed the apparent contractual intent of the parties and placed no duty to deliver possession upon the landlord. No real hardship was placed on the lessee since he had the power to gain possession of the premises by a summary proceeding as a result of the power of attorney.

*Rice v. McGarvey*[115] involved facts very similar to those in *Cozens*, although it was not expressly stated in the lease that a tenant was then in possession. Prior to the commencement of the new lessee's term, the lessor notified him that the tenant in possession refused to vacate and offered to return the $200 prepaid rent. This was rejected by the lessee, and in a subsequent suit for damages against the lessor for failure to deliver possession, a verdict was directed for the lessee for the $200 paid in advance plus interest. On plaintiff's motion for a new trial, the Court of Common Pleas of Allegheny County refused to grant a new trial, relying on the *Cozens* rule that no duty to deliver possession rested on the lessor in the absence of an express covenant. The lessor-defendant did not appeal; thus the question of whether the lessee was entitled to *any* recovery was not reviewed. Strict reliance on the rule laid down in *Cozens*, the American Rule, would have found no duty upon the lessor, therefore, no breach and no recovery by the lessee. The lessee in *Rice* had no remedy for the recovery of possession of the demised premises and rather than impose such a hardship, the court allowed the lessee to rescind the contract and obtain restitution of the prepaid rent, returning the parties to their pre-contract positions.[116] This decision by the Common Pleas Court of Allegheny County would seem therefore, to represent a middle ground between the English and American Rules by placing the risk that the lessee will be excluded by a wrongful third party equally upon the lessor and lessee.

The most recent statement of Pennsylvania law concerning the duty of a lessor to deliver possession to his lessee was in *Dougherty v. Thomas*.[117] Although the case was not decided on this issue,[118] the Pennsylvania Supreme Court, in dictum, recognized the exist-

114. *Id.* at 422.
115. 70 Pitts. L.J. 1055 (Pa. C.P. 1922).
116. *Accord*, Allegaert v. Smart, 10 W.N.C. 29 (C.P. Phila. 1881).
117. 313 Pa. 287, 169 A. 219 (1933).
118. *Id.* The court held that the coal lease constituted a sale of the

ence of an implied covenant to deliver possession in stating that "the implied covenant of a lessor as to delivery of possession is merely that there shall be at the time the lessee's right to possession attaches, no impediment to his taking possession."[119] In this case the lessee was attempting to invoke a breach of the implied covenant to deliver possession as a defense to an action for rent. The only impediment alleged by the lessee was a trespass which he had directed in the capacity of general manager of the company holding a clay lease on the premises. The court responded to this allegation in stating "[i]t would be a legal anomaly if a lessee could successfully invoke as a defense to the payment of an agreed-to rent for a property, a trespass which he himself directed."[120]

The phrasing of the implied covenant to deliver possession in *Dougherty* is almost identical to that in *King v. Reynolds*,[121] the leading American case adopting the English Rule. Although the implied covenant to deliver possession was not the determinative issue in *Dougherty*, the court, via dictum seems to have espoused the English Rule, modified by the logical corollary that the covenant does not extend to acts under the control of the lessee. The contention that a covenant to deliver possession will be implied in Pennsylvania is supported by those cases which, in denying a lessee the right to ejectment prior to entry, state that his remedy is against the lessor.[122]

## III. Conclusion

It is unclear whether Pennsylvania law implies a covenant to deliver actual possession to the lessee in the absence of an express covenant. The case law has made no clear statement whether the American or the English Rule is the law in Pennsylvania. There has been little case law in this area of the law in Pennsylvania, with the most recent decision in 1933.[123] The present housing shortage in this state and the power of a landlord to bring a summary proceeding against a holdover tenant where a lessee cannot, must be considered in determining which rule to adopt. The logic behind a rule requiring a landlord to deliver actual possession where the lessee personally cannot maintain a summary proceeding against a holdover tenant[124] is even more compelling when it is remembered that, in Pennsylvania, a lessee who has not entered the premises

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coal and thus no proof of entry into possession by the lessee was essential.

119. *Id.* at 295, 169 A. at 222.

120. *Id.*

121. 67 Ala. 229, 233 (1880). "In other words, that there shall then be no impediment to his taking possession." [*sic*] *Compare with* text accompanying note 120 *supra*.

122. Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207 (1909); Sennett v. Bucher, 3 Pen. & W. 392 (1832); Dime Bank & Trust Co. v. Walsh, 143 Pa. Super. 189, 17 A.2d 728 (1941).

123. Dougherty v. Thomas, 313 Pa. 287, 169 A. 219 (1933).

124. *See* notes 103-105 and accompanying text *supra*.

may not even maintain ejectment.[125] One solution would be to follow the lead of the New York legislature which, by statute, made delivery of actual possession an implied *condition* of all leases of real property.[126] Such a position is an equitable solution in that neither lessee nor lessor will be responsibile for the wrongful acts of third parties and the lessee is not required to bring a law suit in order to prevent a loss.

It is apparent that a lessee who has not entered the demised premises does not have a remedy to gain possession of the premises under Pennsylvania law.[127] The primary object of most leases for use and occupancy is to obtain living quarters. A power to rescind the contract of lease does not fulfill this objective. It is suggested that a lessee be given a statutory remedy for the recovery of possession of real property. The requirement of entry and the *interesse termini* should be abolished. This was done in England by the Law of Property Act 1925.[128] The effect of this Act was to make all leases for a term of years effective from the date fixed for the commencement of the term, even without entry.

Upon the enactment of such a statute in Pennsylvania, a lessee would be able to recover possession of the demised premises by ejectment, even though he had not previously entered the premises. However, a lessee, desirous of obtaining living quarters, may not be able to bear the hardships which the delays and expenses of an ejectment might entail. Therefore, to remedy such a likely, but unfortunate, situation, it is suggested that the Rules of Civil Procedure for Justices of the Peace be modified to extend the remedy of a summary proceeding for the recovery of possession of real property to include lessees entitled to possession.

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125. *See* notes 11-21 and accompanying text *supra.*
126. N.Y. REAL PROP. LAW § 223-a (McKinney 1968):
> In the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and recover the consideration paid. Such right shall not be deemed inconsistent with any right of action he may have to recover damages.

(Added L. 1962, c. 170, § 1, eff. Sept. 1, 1962).
127. *See* notes 11-63 and accompanying text *supra.*
128. 15 & 16 Geo. 5 c. 20.